

KIM (Migration) [2022] AATA 3635 (19 September 2022)

CORRIGENDUM

DIVISION: Migration & Refugee Division

APPLICANT: Mr Kyeongwoo KIM

CASE NUMBER: 2102289

HOME AFFAIRS REFERENCE(S): BCC2020/2728913

MEMBER: Mark Bishop

DATE OF DECISION: 19 September 2022

**DATE CORRIGENDUM
SIGNED:** **28 October 2022**

PLACE OF DECISION: Melbourne

AMENDMENT: The following corrections are made to the decision:

- In paragraph 2, replace cl.500.217 with cl.417.221

- In paragraph 5, delete "the fact that the representative of the applicant wrote to the Tribunal and provided advice as set out in paragraph 5 above"

- In paragraph 9, replace cl.500.217 with cl.417.221

- In paragraph 23, replace 500.217(1) with cl.417.221

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Statement made on 28 October 2022 at 3:07pm

Mark Bishop
Senior Member

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DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Mr Kyeongwoo KIM

CASE NUMBER: 2102289

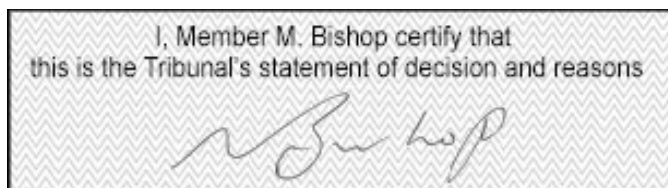
HOME AFFAIRS REFERENCE(S): BCC2020/2728913

MEMBER: Mark Bishop

DATE: 19 September 2022

PLACE OF DECISION: Melbourne

DECISION: The Tribunal affirms the decision not to grant the applicant a Working Holiday (Temporary) (Class TZ) visa.



Statement made on 19 September 2022 at 9:45am

CATCHWORDS

MIGRATION – Working Holiday (Temporary) (Class TZ) visa – Subclass 417 (Working Holiday) – specified work in regional Australia – false bank transaction statement – compassionate or compelling circumstances – decision under review affirmed

LEGISLATION

Migration Act 1958, ss 5(1), 65
Migration Regulations 1994, Schedule 2, cl 417.221; Schedule 4, Public Interest Criterion 4020; r 1.03

CASES

Arora v MIBP [2016] FCAFC 35
Batra v MIAC [2013] FCA 274
Kaur v MIBP [2017] FCAFC 184
Plaintiff M64/2015 v MIBP [2015] HCA 50
Trivedi v MIBP [2014] FCAFC 42

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

6. This is an application for review of a decision made by a delegate of the Minister for Home Affairs on 19 February 2021 to refuse to grant the applicant a Working Holiday (Temporary) (Class TZ) visa under s 65 of the *Migration Act 1958* (Cth) (the Act).
7. The applicant applied for the visa on 29 November 2020. The delegate refused to grant the visa on the basis that the applicant did not satisfy the requirements of cl cl.500.217 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations).
8. On 26 August 2022 the Tribunal wrote to the review applicant advising that it had considered all the material it had about the application but could not make a favourable decision on that information alone. The Tribunal invited the review applicant to give evidence and present arguments at a hearing on 19 September 2022. The Tribunal advised the applicant the hearing would be contacted by mobile phone. The invitation stated that if they did not attend the hearing and an adjournment was not granted, the Tribunal may decide on the case without further notice. On 15 and 16 September 2022 the Tribunal sent system generated SMS reminder notices to the applicant's phone number.
9. The applicant did not appear before the Tribunal.
10. The review applicant did not appear before the Tribunal for the phone hearing on the day and at the scheduled time. Having reviewed the Tribunal file, the Tribunal is satisfied that the review applicant was properly invited to a hearing in accordance with relevant provisions in the Act and the invitation has not been returned to sender. The Tribunal considered the many attempts by the Tribunal to contact the applicant on the day of the hearing, the fact that the representative of the applicant wrote to the Tribunal and provided advice as set out in paragraph 5 above. In these circumstances, and pursuant to the provisions of the Act, the Tribunal has decided to make its decision on the review without taking any further action to enable the applicant to appear before it.
11. The applicant provided a copy of the decision record to the Tribunal. The applicant was assisted in relation to the review.
12. Movement records showed the applicant departed Australia on 16 April 2021 and his BVA ceased on 16 April 2021.
13. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed..

CONSIDERATION OF CLAIMS AND EVIDENCE

14. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl cl.500.217 for the grant of the visa. Broadly speaking, this requires that:
 - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and

- the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and
 - the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and
 - neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).
15. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in material particular?

16. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s 5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.
17. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
18. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
19. The delegate made a finding that department checks indicated that the NAB bank transaction statements provided as evidence of specified work completed with the nominated employer, may be a bogus document, as the issuing authority (National Australia Bank) has verified the bank transaction statement supplied by the applicant, is a false statement.
20. The applicant did not challenge this finding of the delegate. There is no evidence before the Tribunal that the finding of the delegate is incorrect. The applicant did not provide a written submission to the Tribunal.
21. Based on the evidence and information before the Department, the Tribunal is satisfied that the information and evidence provided in support of the specified work submitted to the Department on 29 November 2020 is a bogus document, as defined in PIC4020(1).

22. Therefore the applicant does not satisfy PIC4020(1).

23. Therefore, PIC 4020(2) is not met.

Should the requirements of PIC 4020(1) or (2) be waived?

24. The requirements of PIC 4020(1) and (2) may be waived where there are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in reg 1.03), that justify the granting of the visa. The decision-maker must first be satisfied that there are such circumstances, then must consider whether to exercise the discretion to waive the requirements, having regard to those circumstances: *Kaur v MIBP* [2017] FCAFC 184.

25. The expressions 'compelling circumstances' and 'compassionate or compelling circumstances' are not defined for these purposes. To be compelling, the circumstances must force or drive the decision-maker irresistibly to be satisfied: see *Plaintiff M64/2015 v MIBP* [2015] HCA 50. The ordinary meaning of 'compassionate' relates to feelings of sympathy, sorrow, pity or concern for others.

26. The applicant did not address the requirements of PIC 4020(1) or (2).

27. The Tribunal is not satisfied that the requirements should be waived.

28. Concluding paragraphs

29. On the basis of the above, the applicant does not satisfy PIC 4020 for the purposes of cl 500.217(1).

30. DECISION

31. The Tribunal affirms the decision not to grant the applicant a Working Holiday (Temporary) (Class TZ) visa.

32. Mark Bishop

33. Senior Member

ATTACHMENT

Migration Regulations 1994

Schedule 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is ***false or misleading in a material particular*** means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

...

Migration Act 1958

s 5 Interpretation

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

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